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No. 90-858

In the Supreme Court of the United States

OCTOBER TERM, 1990

LOUIE V. PITTMAN, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a litigant may not, through the mechanism of a contempt proceeding, obtain reconsideration of an order that has become final and non-appealable.

2. Whether the court of appeals correctly held that a district court has no authority to order the Secretary of Health and Human Services (HHS) to pay from general funds an attorney's fee award in disability benefits cases under Section 206(a)(1) of the Social Security Act, 42 U.S.C. 406(a)(1), for services performed by an attorney before the agency.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A33-A55) is reported at 911 F.2d 42. The opinions of the district court in *Pittman* v. *Secretary of Health & Human Services* (Pet. App. B56-B72) and *Ziegenhorn* v. *Bowen* (Pet. App. C73-C93) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1990. A petition for rehearing was denied on September 19, 1990. Pet. App. D94-D95. The petition for certiorari was filed on November 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. *Facts Relating to Petitioner Ziegenhorn*

1. Petitioner Ziegenhorn had received disability insurance benefits prior to February 28, 1984, when the Social Security Administration (SSA) determined that his disability had ceased and terminated his benefits. Ziegenhorn then filed a complaint in the district court challenging the termination of his benefits. While the case was pending, Congress enacted the Social Security Disability Benefits Reform Act of 1984 (the 1984 Reform Act), which, among other things, provided a new standard to be used in determining whether a beneficiary's disability had ceased. 42 U.S.C. 423(f). On the Secretary's motion, the district court remanded the case for further review under the new standard. See Pet. App. C73.

2. While the case was on remand, Ziegenhorn elected to receive interim disability benefits under 42 U.S.C. 423(g).[1] See Pet. App. A34. In October 1986, the Secretary reinstated Ziegenhorn's benefits. Excluding interim benefits already paid, Ziegenhorn's past-due benefits totaled $3,958.70. *Id.* at A36.

3. The Social Security Act authorizes a court to award an attorney's fee of up to 25% of past-due benefits awarded by the court. 42 U.S.C. 406(b)(1). This fee is to be paid "out of, and not in addition to, the amount of such past-due benefits." *Ibid.* Accordingly, the Secretary withheld 25% of the past-due benefits, for payment of authorized

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[1] 42 U.S.C. 423(g)(2)(A) provides that where "the final decision of the Secretary affirms the determination that [a claimant] is not entitled to such benefits, any benefits paid * * * pursuant to such election * * * shall be considered overpayments." Such "overpayments" are subject to recoupment by the SSA pursuant to 42 U.S.C. 404(a)(1) unless "recovery would defeat the purpose of [the Act] or would be against equity and good conscience." 42 U.S.C. 404(b).

attorney's fees, and released the remainder to the claimant. Pet App. A36.

4. In April 1987, the district court awarded Ziegenhorn's attorney (Anthony Bartels) a fee of $1,015, or 25% of Ziegenhorn's past-due benefits, whichever was less, for his representation of Ziegenhorn in the district court. Pet. App. A36. As the district court subsequently noted, the order "was silent on the question of how the Secretary was to calculate attorney fees from the claimant's past due benefits * * * [although,] as Mr. Bartels [was] aware, it had been previously the opinion of this court that interim benefits could be excluded from attorney fee calculations." Pet. App. C77. Bartels did not appeal this order.

5. The Social Security Act similarly authorizes the Secretary to make an award of a reasonable attorney fee of up to 25% of past-due benefits awarded by the agency in administrative proceedings. 42 U.S.C. 406(a). As with fees awarded by the district court, the fee for representation of the claimant before the agency is to be paid "out of such past-due benefits." *Ibid.* In July 1987, the Secretary determined reasonable attorney's fees for Bartel's services at the administrative level would be $1,618.17. The Secretary then released to Bartels the $989.67 withheld, representing 25% of Ziegenhorn's past-due benefits. Pet. App. A36-A37.

6. In 1988, the Eighth Circuit held in *Gowen* v. *Bowen*, 855 F.2d 613 (1988), that, for the purpose of calculating attorney's fees under 42 U.S.C. 406, the term "past-due benefits" includes "interim benefits." In December 1988, several months after *Gowen* was decided, and over a year after the district court decision in *Ziegenhorn* became final and nonappealable, Bartels filed a motion in the district court to hold the Secretary in contempt for failure to comply with the court's April 1987 order awarding fees. Bartels claimed that the Secretary had disobeyed the order by not including "interim benefits" as part of "past-due benefits."

The motion also stated that Ziegenhorn had refused to pay the balance of the attorney's fees owed.

7. Because its April 1987 order did not require the Secretary to include interim benefits as part of past-due benefits, however, the court denied the contempt motion. Nonetheless, the court ruled that *Gowen* should apply retroactively and, on that basis, ordered the Secretary to pay Bartels the administrative fee authorized by the Secretary plus the balance remaining on the court-ordered fee ($25.33), or 25% of Ziegenhorn's past-due benefits as defined by *Gowen*, whichever was less. Pet. App. A37-A38.

B. ***Facts Relating To Petitioner Pittman***

8. The SSA terminated the disability benefits of Louie V. Pittman and, after exhausting his administrative remedies, Pittman filed suit in district court. Following enactment of the 1984 Reform Act, his case was remanded and, on remand, his disability benefits were restored. The total benefit to the plaintiff from the final administrative decision was $12,903.60, of which $8,040.20 had already been paid as interim benefits, $4,187.00 constituted the unpaid past-due benefits and $676.40 represented benefits paid erroneously following the initial termination.

9. Under 42 U.S.C. 406(b)(1), the district court awarded Pittman's attorney, Bartels, a fee of $1,782.16 or 25% of Pittman's "past-due benefits," whichever was less, for representing Pittman at the district court level. The district court expressly held, however, that "past-due benefits" did not include "interim benefits" for the purpose of calculating the fees to be paid to Bartels. Pet. App. A38.

10. In July 1987, the Secretary released $1,046.82 to Bartels. This amount represented 25% of Pittman's "past-due benefits," not including "interim benefits." Bartels then filed an appeal from the fee award, which the Eighth

Circuit consolidated with *Gowen* v. *Bowen*, *supra*. The court of appeals ultimately held that, for purposes of Section 406(b)(1), "past-due benefits" included "interim benefits," and it remanded *Pittman* for recalculation of the fees due plaintiff's counsel. Pet. App. A38-A39.

11. On February 2, 1989, following the remand, SSA authorized Pittman's attorney to charge a fee of $1,254.16 under 42 U.S.C. 406(a) for representing Pittman at the administrative level. The Secretary advised Bartels that, pursuant to the district court order, the agency had released to Pittman all amounts beyond the $1,046.82 already transferred to Bartels and that Bartels would therefore have to look to Pittman for the remainder of his fee. Pet. App. A39.

12. Bartels responded by filing a motion in district court to hold the Secretary in contempt for failing to withhold, and pay to Bartels, 25% of the "interim benefits" as part of the plaintiff's "past-due benefits." He sought the additional $735.34 ($1,782.16 less $1,046.82) awarded by the district court based on interim benefits. He also requested that the Secretary be required to pay him the $1,254.16 awarded by the Secretary for counsel's representation during administrative proceedings. Bartels argued that Pittman was unable and unwilling to pay these fees and that the Secretary should be responsible for recouping this amount from the plaintiff by withholding future amounts from the plaintiff's benefits, as authorized by 42 U.S.C. 404(a)(1). Pet. App. A39-A40.

13. The district court denied the contempt motion. The court, however, ordered the Secretary to pay Bartels the balance owing on the court-ordered fee ($735.34), as well as the administrative fee authorized by the Secretary. The court further ordered the Secretary to recoup these amounts from Pittman's future disability benefits. Pet. App. A39-A40.

C. Proceedings On Appeal

14. On the consolidated appeal, the court of appeals held that the district court properly had declined to hold the Secretary in contempt in both *Ziegenhorn* and *Pittman*, because the Secretary was never in violation of the district court's order. Pet. App. A40, A43. In *Ziegenhorn*, moreover, the court of appeals held that Bartels' attempt to seek retroactive application of the *Gowen* decision through a contempt proceeding constituted an impermissible collateral attack on the district court's April 1987 order, which had long since become final and non-appealable. Pet. App. A40-A41.

15. Although Bartels' request for relief in *Pittman* did not constitute a collateral attack (since the case was on remand from the first appeal), the court of appeals concluded that the district court erred in ordering the Secretary to pay Bartels the authorized administrative fee and in directing the Secretary to recoup that amount from Pittman, because the Secretary's authority to award administrative fees under 42 U.S.C. 406(a) is exclusive and unreviewable. Pet. App. A43-A44. The court of appeals further held that the district court lacked authority to order the Secretary to pay the balance remaining on its fee award out of general social security funds because of the government's sovereign immunity. Pet. App. A45.

16. The court of appeals further concluded in *Pittman*, however, that the district court could direct the Secretary to pursue recoupment of the erroneously paid-out interim benefits for purposes of an award of fees for services at the district court level under 42 U.S.C. 406(b)(1), except to the extent the Secretary must waive recoupment as against equity and good conscience under 42 U.S.C. 404(b). Pet. App. A47-A50.

ARGUMENT

1. The petition arising from the *Ziegenhorn* case should be denied. Petitioner claims (Pet. 27-32) that an order that had been final for more than a year could be collaterally attacked and modified on Ziegenhorn's application for contempt. Petitioner Ziegenhorn sought to have the Secretary held in contempt for failure to comply with the district court's April 1987 order awarding attorney's fees. But, as both the district court (Pet. App. C77-C78) and the court of appeals (Pet. App. A40) held, the Secretary fully complied with both the express terms and the intent of the April 1987 order. Accordingly, the district court properly denied petitioner's motion for contempt.

The illogic of petitioner's position is apparent. Contempt punishes disobedience of an *existing* order or rule (18 U.S.C. 401(3)). If the order had to be amended to reach the result petitioner sought, it could not have been contemptuous to oppose the amendment. Quite obviously, a district court does not abuse its discretion in denying a motion for contempt where the party against whom contempt is sought has not violated a lawful writ, order, rule, decree or command of the court. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

The court of appeals also correctly held (Pet. App. A40-A41) that once the district court had denied Bartels' motion for contempt it should not have gone on to award him other relief. As the court of appeals held, Bartels' effort through the contempt proceeding to amend the final judgment to obtain retroactive application of *Gowen* constituted an impermissible collateral attack on the district court's April 1987 order. As this Court has held, "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed." *Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*,

478 U.S. 421, 441 n.21 (1986), quoting *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948); *United States* v. *Rylander*, 460 U.S. 752, 756 (1983).[2]

Moreover, contrary to petitioner's suggestion (Pet. 28), reopening the final judgment was not "the only relief available to him." As he had in both the *Pittman* and *Gowen* cases, Bartels was free to file an appeal from the district court's April 1987 order in *Ziegenhorn* if he believed the order denied him all the relief to which he was entitled. Having failed to appeal the order, however, petitioner is not entitled to another opportunity to challenge that order by way of a motion for contempt. As the Third Circuit has observed, "any other rule would set to nought the time limits for seeking appellate review set forth in Fed. R. [App.] P. 4(a)." *United States* v. *Millstone Enters., Inc.*, 864 F.2d 21, 23 (3d Cir. 1988). Cf. *United States* v. *Ryan*, 402 U.S. 530, 532 n.4 (1971) (the validity of an order may not be challenged in a contempt proceeding if the opportunity for effective review of the order was available at an earlier stage).

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[2] The authorities cited by petitioner for the proposition that a district court has inherent authority to punish for contempt and, in appropriate circumstances, to fashion an equitable remedy (Pet. 27-31) do not support the proposition that a court may exercise its contempt power in the absence of contemnible conduct, or use its equitable powers to reopen final and unappealable judgments. Rather, they demonstrate that a court may fashion an equitable remedy to correct a continuing violation of an outstanding order or duty, even if the same conduct were sanctionable by way of contempt. See *Smith* v. *Bounds*, 813 F.2d 1299, 1303 (4th Cir.), cert. denied, 488 U.S. 869 (1987) (the contempt power of a court does not limit its discretion to fashion equitable remedies for a continuing constitutional violation); *Berger* v. *Heckler*, 771 F.2d 1556, 1569 (2d Cir. 1985) (a court may fashion an equitable remedy to prevent continued non-compliance with a previous order even absent a finding of contempt); *Alexander* v. *Hill*, 707 F.2d 780, 783 (4th Cir.), cert. denied, 464 U.S. 874 (1983).

2. The petition in *Pittman* should also be denied. In *Pittman*, petitioner challenges (Pet. 10-27) that portion of the court of appeals' decision holding that the district court lacked authority to order the Secretary to pay Bartels the full amount of administrative fees authorized by the Secretary.[3] The court of appeals correctly held (Pet. App. A43-A44) that, under 42 U.S.C. 406(a),[4] the Secretary has exclusive authority to award attorney's fees for services performed at the administrative level and that such awards are not subject to judicial review. See *Copaken* v. *Secretary of HEW*, 590 F.2d 729, 731 (8th Cir. 1979) (per curiam). See also *Guido* v. *Schweiker*, 775 F.2d 107, 109 (3d Cir. 1985); *Whitt* v. *Califano*, 601 F.2d 160, 161-162 (4th Cir. 1979).[5]

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[3] The petition does not seek review of the court of appeals' conclusion (Pet. App. A44) that the district court also lacked authority to direct the Secretary to recoup past-due benefits released to the claimant for payment of the administrative fee award. Instead, the petition contends that the court erred by not directing respondent to pay the administrative attorney fee, regardless of the availability of recoupment, on the theory that the government must stand good for the fees released "due to its own alleged 'error.'" Pet. 13.

[4] The court of appeals mistakenly referred to Section 406(b)(1), instead of 406(a), in its opinion. Pet. App. A43.

[5] *Webb* v. *Richardson*, 472 F.2d 529 (6th Cir. 1972), cited by petitioner (Pet. 22, 24-25), is not to the contrary. Although the court of appeals in *Webb* held that the courts have authority to determine an appropriate attorney's fee for services at both the administrative and district court levels, it does not suggest that a fee award established by the Secretary would be subject to judicial review. In any event, *Webb* stands alone among the circuits in holding that the district court has authority to award counsel fees for representation before the agency. See *Guido* v. *Schweiker*, 775 F.2d 107, 108-109 (3d Cir. 1985) (the Social Security Act does not grant either court or agency the authority to set fees in the other's jurisdiction); *Whitt* v. *Califano*, 601 F.2d 160 (4th Cir. 1979) (courts have no statutory authority to award counsel fees for representation before the agency); *Gardner* v. *Menendez*, 373 F.2d 488 (1st Cir. 1967) (same).

Whether the district court can review and enforce the Secretary's award, however, is not at issue here. See note 3, *supra*. Rather, the question on this petition is whether a district court can enforce an administrative fee award that the Secretary has authorized to be paid from past-due benefits under 42 U.S.C. 406(a) by ordering the Secretary to pay such a fee directly out of general social security funds. See Pet. 24. The answer, correctly provided by the court of appeals, is that a court may not.

Under 42 U.S.C. 406(a), the Secretary may fix a reasonable fee to compensate an attorney for services performed by the attorney at the administrative level. If as a result of a favorable determination the claimant is entitled to past-due benefits, the Secretary may certify an attorney's fee for payment "out of" the "past-due benefits" in an amount up to 25% of the claimant's past-due benefits. 42 U.S.C. 406(a). As the court of appeals held (Pet. App. A45), 42 U.S.C. 406(a) contemplates payment of an attorney's fee award by the *claimant*—either out of the claimant's past-due benefits or out of the claimant's own funds—and not by the government out of general social security funds.

Section 406(a) cannot be construed to waive the *government's* immunity for attorney's fees. *Cornella* v. *Schweiker*, 728 F.2d 978, 987 (8th Cir. 1984) (42 U.S.C. 404 does not allow a claimant "to recover fees against the government"). Absent such a waiver, the United States is not liable for the payment of a fee award out of general funds. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983). For this reason, petitioner simply is wrong in suggesting that merely because the Secretary "has already set an administrative award for the petitioner in this case * * * [a] federal court [may] order the actual payment of that award" (Pet. 24). The decision below correctly applies *Ruckleshaus* and is not in conflict with decisions of other circuits. Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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